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No.

In the Supreme Court of the United States

October Term, 1984

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the lawfulness of an employer's interrogation of an employee is to be determined by application of a *per se* rule (as was done in the instant case) or by a consideration of the facts and circumstances of the particular case.

2. Whether a court of appeals, upon review of an order of an administrative agency, should remand the matter for further consideration when the agency has subsequently overruled the law and policy on which its prior order was based.

3. Whether in view of the rights of employees to choose their collective bargaining agents in a fair and informed election, the National Labor Relations Board should set aside representation elections for last minute campaign materials that contain material misrepresentations of fact or are so deceptively presented as to constitute forgeries.

4. Whether an employer's post-certification letter informing employees of the employer's intention to test union certification through a technical refusal to bargain is protected by the First Amendment to the Constitution of the United States and by Section 8(c) of the National Labor Relations Act.

PARTIES AND RULE 28.1 STATEMENT

This petition is filed on behalf of Van Dorn Plastic Machinery Company ("Van Dorn" or "the Company"), a division of Van Dorn Company.* Respondent is the National Labor Relations Board ("the Board"). While it was not a party to the proceedings in the Court of Appeals, the International Association of Machinists and Aerospace Workers, District 54 was a party to the proceedings before the National Labor Relations Board, and thus has an interest in the present proceedings.

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*Other divisions of Van Dorn Company are Central States Can Co., Davies Can Co., George A. Milton Can Co., and Trubor Co. Van Dorn is also a co-owner of Reifenhauser-Van Dorn Co., a joint venture.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Van Dorn Plastic Machinery Company, Petitioner herein, respectfully petitions for certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion and initial judgment of the United States Court of Appeals for the Sixth Circuit, entered on June 6, 1984, is unreported and is reprinted at A1 of the Appendix to this petition. The order of the Court of Appeals, entered on July 23, 1984, vacating its judgment of June 6, is unreported and is reprinted at A41 of the Appendix. The judgment of the Court of Appeals, entered on July 23, 1984, is unreported and is reprinted at A42 of the Appendix. The decision and order of the National Labor Relations

Board, entered on December 14, 1982, is reported at 265 N.L.R.B. 864 (1982) and is reprinted at A18 of the Appendix. The order of the National Labor Relations Board remanding the case to the administrative law judge, entered on November 12, 1980, is reported at 253 N.L.R.B. 268 (1980) and is reprinted at A32 of the Appendix. The decision and certification of representative of the National Labor Relations Board, entered on January 17, 1978, is unreported and is reprinted at A39 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 23, 1984. A timely petition for rehearing was denied on July 17, 1984, and the court's order is reprinted at A48 of the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and §2350.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, which provides as follows:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

This action also involves several provisions of Section 158 of the National Labor Relations Act of 1947, as amended, 29 U.S.C. §158 ("the Act"), which provide in pertinent part as follows:

Section 158. UNFAIR LABOR PRACTICES

(a) Unfair Labor Practices By Employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

* * * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 159(a) of this title.

* * * * *

(c) Expression Of Views Without Threat Of Reprisal Or Force

The expressing of any views, arguments or opinions or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

STATEMENT OF THE CASE

This petition seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit enforcing in part the decision and order of the National Labor Relations Board, finding violations by Van Dorn of the National Labor Relations Act of 1947, as amended, 29 U.S.C. §151 et seq. Van Dorn seeks review of the following determinations by the Court of Appeals:

(1) That Van Dorn violated §8(a)(1) of the Act by informing employees in a post-certification letter that it would refrain from bargaining with the Union until its challenge of the Union's certification was resolved in the courts.

(2) That a Van Dorn Vice-President unlawfully interrogated, restrained and coerced a Union adherent in violation of §8(a)(1) of the Act.

(3) That a Union flyer interjected into the representation campaign at a time when the Company was unable to respond to it was neither a forgery nor a material misrepresentation of issues of extreme importance to the employees, and therefore did not justify the holding of a new election.

STATEMENT OF FACTS

On March 3, 1977, the Union filed a petition with the Board seeking to represent all production and maintenance employees of Van Dorn, a northeast Ohio employer, for purposes of collective bargaining. A representation election was held on April 22, 1977, which resulted in a slim majority of the votes being cast in favor of representation by the Union. Van Dorn filed objections to the conduct of the election, and to the conduct of the Union which affected the results of the election. One of the objections concerned the distribution by the Union, on the eve of the election, of a document purporting to be a copy of portions of one of its contracts (the "Nelson Flyer"). App. at 49.*

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*Refers to pages of the Appendix. *Note*: In light of the restrictions imposed by Rule 33(c) of the Supreme Court Rules, a copy of the Nelson Flyer has been lodged with the Clerk of this Court.

The document was a forgery: the collage of photocopied items, all of which appeared to be from a contract between the Union and Nelson Stud Welding Company, a large employer located near Van Dorn's plant, was in fact composed of excerpts from a contract negotiated in California by another district union with an employer whose name was identical but who had only four employees. The Union carried its deception one step further by including in the collage a set of wage rates that was not in fact photocopied from the California contract, but was made up by the Cleveland union organizer. The Union deliberately hid from Van Dorn's employees the location of the listed plant, and the identity of the signatory union. The Board's Regional Director conducted a limited investigation and, while he found that the Nelson Flyer was a material misrepresentation, he nevertheless, without a hearing, recommended overruling all of Van Dorn's objections. Van Dorn's exceptions to the Regional Director's decision were overruled and the Union certified on January 17, 1978. App. at A39.

Commencing on February 22, 1978, the Union requested to bargain with Van Dorn. Van Dorn, intending to pursue its election objections and to test the certification of the Union, engaged in a technical refusal to bargain and so informed the Union. The Union considered resorting to a strike in an attempt to force Van Dorn to bargain. It held two strike votes, the first on April 2, 1978, and the second on May 7, 1978, both of which it publicized in advance.

Before the strike votes, William Sheffield, Van Dorn's Vice-President of Operations, who frequently conversed with employees at their work stations, had a variety of conversations with Thomas Vale, a designated Union representative. Two such conversations form the basis for the

Board's later charge of unlawful interrogation. The first conversation took place before the April 2 vote. Mr. Sheffield approached Vale and asked whether the Union was taking a strike vote that weekend. After Vale responded affirmatively, Mr. Sheffield told him that the employees did not need to go on strike and should allow the courts to resolve the matter. Sheffield never asked Vale how he or any other employee was going to vote.

The second conversation occurred after the Union announced its intention to take a second strike vote, but before the vote was held. At that time, Mr. Sheffield again discussed with Vale the possibility that the employees would vote for a strike and asked whether the employees would report to work on the following Monday. Vale said he hoped the employees would vote to strike. The two then joked about the possibility of the pickets using the Company's scrap wood for a fire on the picket line. Again, Sheffield did not ask how Vale or any other employee was going to vote. Vale admitted that he never felt in any way threatened in his conversations with Mr. Sheffield.

Prior to the May 8 strike vote, Van Dorn distributed a letter to the employees (the "Smith Letter"), App. at A59. The Smith letter informed employees that Van Dorn would refrain from bargaining with the Union until the courts had resolved whether the election was fair. The letter on its face was designed to respond to incorrect statements of the Union claiming that Van Dorn had stated that it would never bargain with the Union. Smith's response formed the basis for the Board's finding of a violation of §8(a)(1).

RULINGS BELOW

The Board's decision in December 1982, marked the end of a 5 1/2 year odyssey during which time the Board changed its mind on a fundamental policy question no less than three times. In addition, long administrative delays were encountered, exacerbating an already volatile workplace situation.

On April 28, 1977, Van Dorn filed formal objections to the representation election. After an informal investigation without hearing, the Regional Director of the Board issued a report recommending that Van Dorn's objections be overruled and the Union certified. The Regional Director determined that the Nelson Flyer did not rise to the level of a forgery under *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), a case decided after the petition was filed but before the election. Under *Shopping Kart*, which overruled *Hollywood Ceramics Company, Inc.*, 140 N.L.R.B. 221 (1962), campaign misrepresentation, absent forgery, is not sufficient alone to set aside a representation election. The Board subsequently certified the results of the election on January 17, 1978.

When Van Dorn chose to test the Union's certification through a technical refusal to bargain, the Board issued a series of complaints alleging that Van Dorn unlawfully refused to bargain with the Union in violation of §8(a)(5) of the Act, and that the Smith Letter and the Sheffield conversations constituted violations of §8(a)(1) of the Act. Hearings on the complaints were held in Cleveland, Ohio on October 24 and 25, and on December 6, 1978, before an administrative law judge. Over a year later (during which time the Board abandoned the *Shopping Kart* standard), on March 31, 1980, the law judge issued

a decision and recommended order (Supp. App. at S1-S84)* finding, in pertinent part, that the Sheffield conversations did constitute a violation of the Act. However, the law judge also found, in light of the newly-applicable Board standard as announced in *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978), that the Nelson Flyer contained substantial misrepresentations sufficient to invalidate the representation election. *General Knit* overruled *Shopping Kart* and reinstituted the *Hollywood Ceramics* standard for evaluating campaign misstatements, allowing the Board to void an election on the basis of either a material misrepresentation or a forgery. The law judge therefore found no violation in Van Dorn's announced intention in the Smith letter not to bargain with the Union pending its challenge to certification, since the refusal was justified by the Board's *General Knit* standard.

The Board declined to review the law judge's recommendations on their merits; instead, on November 12, 1980, it remanded the case to the law judge for further evidentiary hearings in light of *General Knit* on Van Dorn's objection to the Nelson Flyer and, derivatively, the certification of the Union (App. at A32). After a second set of hearings on January 21 and 22, 1981, the law judge issued a supplemental decision (Supp. App. at S85) which found that Van Dorn's objection was without merit and that consequently, Van Dorn's refusal to bargain was a violation of §8(a)(5) of the Act. The law judge also reversed his previous decision with respect to the Smith letter, finding it to be a violation of §8(a)(1) of the Act.

Prior to rendering its decision in the present case, the Board overruled *General Knit*. *See, Midland National Life Insurance Company*, 263 N.L.R.B. 127 (1982). As a result

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*Refers to pages of the Supplemental Appendix.

of its readoption of the *Shopping Kart* standard, the Board affirmed the law judge's supplemental recommendations regarding Van Dorn's objections to the Nelson Flyer without formally analyzing his decision under the *Hollywood Ceramics/General Knit* standard. The Board also affirmed other findings of the law judge concerning Van Dorn's refusal to bargain, the Smith letter, and the Sheffield conversation. The Board overruled other portions of the law judge's decision not relevant to this petition. *See,* App. at A18. Accordingly, the Board ordered Van Dorn, *inter alia,* to recognize and bargain with the Union, to cease interrogating employees concerning strike votes and urging employees not to support a strike, and to refrain from telling employees that Van Dorn would not bargain with the Union until the courts determined whether the election was fair. It was this order that was reviewed by the Court of Appeals.

The largest part of the court's opinion (App. at A1) addressed the issue of the proper standard for determining whether campaign misrepresentations are sufficiently deceptive to set aside an election. The court traced the evolution of the Board's standard of evaluation, remarking that, "incredibly", the Board has employed four standards in the last seven years, reversing itself three times during the pendency of the present case. The court chose, however, to apply the *Midland* standard. The court found that while the Nelson Flyer contained misrepresentations, the flyer was not a forgery. Therefore, measured by the "new" standard, the misrepresentations alone were insufficient to set aside the election.

The court expressed some reluctance, however, to be bound by the *Midland National Life* rule in every case. It noted that the election may be invalidated even when "no forgery can be proved but where the misrepresentation

is so pervasive and the deception so artful that the employees will be unable to separate truth from untruth and where the rights to a free and fair choice would be affected" (App. at A9). Nonetheless, the court held that the Board did not abuse its discretion in rejecting Van Dorn's objections. The court also accepted the Board's findings regarding the Sheffield conversations and the Smith Letter as based on substantial evidence, but added no further comment. Circuit Judge Contie, in a separate concurrence and dissent, dissented from the court's findings regarding the Sheffield conversations (App. at A15-A16).

REASONS FOR GRANTING THE WRIT

This case raises fundamental questions with respect to the proper standards to be applied by the Board in its administration of the National Labor Relations Act. The parameters of free speech in an employer's communication with employees outside the context of a representation election campaign have never been considered by this Court. The Sixth Circuit's decision concerning the Smith letter and the Sheffield conversations is in conflict not only with the opinions of other circuits, but also with its own decisions and with a recently-decided Board case which rejected the standard used by the court.

Furthermore, the Sixth Circuit's failure either to remand the case to the Board or to apply the Board's new standard conflicts with a previous decision of this Court and the decisions of several other circuit courts.

Also presented for review by this case is the standard to be applied by the Board in judging the propriety of pre-election campaign statements. This issue too is a matter of first impression for this Court. Since 1977, the

Board has reversed itself no less than three times concerning the applicable standard. The First and Sixth Circuits have expressed doubts over the Board's most recent pronouncement in *Midland National Life Insurance.* In light of the Board's apparent inability to formulate a workable standard by which to gauge campaign propaganda, this is an appropriate case for review.

Certiorari Should Be Granted to Resolve Conflicts Among the Lower Courts in Assessing the Lawfulness of Employer Interrogations of Employees.

The Court of Appeals affirmed the Board's finding that the Sheffield conversations were in violation of Section 8(a)(1) of the Act. The Board's finding resulted from its application of a *per se* rule of interpretation of employer-employee communications, which held that questions concerning union activities are deemed inherently coercive of employees' rights protected under §7 of the Act in any circumstances and regardless of the subjective impression of the employee. *See, PPG Industries,* 251 NLRB 1146 (1980). This case and the standard it endorsed was expressly overruled in the Board's recent decision in *Rossmore House,* 269 N.L.R.B. No. 198, 116 L.R.R.M. 1025, 1027 (April 25, 1984).

In *Rossmore House,* the Board returned to the case by case approach in determining the coerciveness of employer interrogation set forth in *Blue Flash Express,* 109 N.L.R.B. 591 (1954), which had been the recognized standard for nearly 25 years prior to the Board's *PPG Industries* decision:

> We will no longer apply the *PPG* standard. We conclude that *PPG* improperly established a per se rule that completely disregarded the circumstances sur-

> rounding an alleged interrogation and ignored the reality of the workplace. Such a per se approach had been rejected by the Board 30 years ago [citing *Blue Flash Express*] when it set forth the basic test for evaluating whether interrogations violate the Act; whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. . . *Rossmore House*, 116 LRRM at 1026.

Prior to the Board's decision in *Rossmore House*, several circuits, including the Sixth Circuit, had rejected the *per se* rule in favor of the *Blue Flash Express* case-by-case approach. Thus in applying the *per se* rule to the Sheffield conversations, the Sixth Circuit is in direct conflict with its own precedent as well as that of several other circuits. In *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), the Second Circuit established a test which has also been employed by the Sixth Circuit. *Jervis Corporation, Bolivar Div. v. NLRB*, 387 F.2d 107 (6th Cir. 1967). *See also, NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984); *NLRB v. Price's Pic-Pac Supermarkets, Inc.*, 707 F.2d 236 (6th Cir. 1983); *NLRB v. Armstrong Circuit, Inc.*, 462 F.2d 355 (6th Cir. 1972); and *Hughes & Hatcher, Inc. v. NLRB*, 393 F.2d 557 (6th Cir. 1968).[1]

The Third Circuit has recently called the *per se* analysis unrealistic.

> . . . To hold any instance of casual questioning concerning union sympathies violates the Act, ignores the

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1. *Bourne's* approach takes into account the history of labor relations at the employer's plant, the authority of the questioner, the formality of the interrogation, the character of the information sought and the employee's truthfulness in reply. *Bourne*, 332 F.2d at 48. The *Bourne* analysis was cited with approval by the Board when it abandoned the *per se* rule. *Rossmore House*, 116 L.R.R.M. at 1027 n.20.

> realities of the work place . . . What the Act proscribes is only those instances of true "interrogation" which tend to interfere with the employees' right to organize. *Graham Architectural Products Corporation v. NLRB*, 697 F.2d 534, 541 (3rd Cir. 1983).

The *per se* rule has also been rejected in the Fifth Circuit, *Mosher Steel Company*, 220 N.L.R.B. 336 (1975), *enforced*, 532 F.2d 1374 (5th Cir. 1976) (there is no *per se* violation where the employer asks the employee if he intends to go on strike); and the Seventh Circuit, *e.g.*, *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980) ("it is well established that interrogation of employees is not illegal *per se*").

Evaluated by the rules of the Second, Third, Fifth and Seventh Circuits, the Sheffield conversations fall well outside the scope of harm from which the Act seeks to protect employees. As demonstrated above, this Court of Appeals too has rejected the *per se* rule in a series of cases. In fact, in an opinion rendered three weeks after the decision in the present case, the Sixth Circuit again disavowed the application of the *per se* rule to employer interrogations of employees! *See*, *NLRB v. Garon*, 738 F.2d 140, 143 (6th Cir. 1984).

The employee, Vale, perceived no threat or coercion in Sheffield's inquiries. *See*, excerpt from Hearing Transcript (App. at A61). In fact, the subject conversations occurred in a place and manner familiar to both men from routine workday relations. Under the rule applied by the court below, however, the Sheffield conversations are unlawful solely by definition. The conflict of standards adopted by the circuits, as well as the inconsistency of application by the Sixth Circuit, will lead to profoundly inconsistent applications of the Act, even inconsistent

adjudications of identical claims against a single employer doing business in several jurisdictions. Until this Court makes a definitive interpretation of §8(a)(1) with regard to employer-employee communications, employers will remain at a loss for guidelines to govern their conduct.

Certiorari Should Be Granted to Correct the Error of the Court of Appeals in Affirming a Board Decision Predicated on Policy Repudiated by the Board Prior to the Court's Review.

The Board's finding that Van Dorn engaged in unlawful interrogation of its employees was governed by the standard articulated in *PPG Industries*. This *per se* rule was expressly overruled by the Board in *Rossmore House* on April 25, 1984, after argument and submission of the present case to the Court of Appeals. In its Petition for Rehearing, Van Dorn alerted the court to the Board's *Rossmore House* decision, but the court declined to review or remand the issue in its Denial of Rehearing (App. at A48). It is the contention of Petitioner that in light of the complete reversal of Board policy in the administration of the Act, the Sixth Circuit was required in adherence to prior precedent of this Court to remand that issue to the Board for reconsideration in light of the newly-promulgated standard.

In *NLRB v. Food Store Employees Local 347*, 417 U.S. 1 (1974), this Court approved a lower court's remand of a Board decision to allow the Board to determine whether an intervening policy modification should be applied retroactively to the case. The court noted that:

> Appellate courts ordinarily apply the law in effect at the time of the appellate decision. However, a court reviewing an agency decision following an intervening

> change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act. 417 U.S. at 10 n.10. (citation omitted).

This rule has been followed in several circuits. *See, e.g., Certainteed Corporation v. NLRB*, 714 F.2d 1042, 1056 (11th Cir. 1983); *Cedar Coal Company v. NLRB*, 678 F.2d 1197, 1199 (4th Cir. 1982) and *NLRB v. Cambridge Wire Cloth Co., Inc.*, 622 F.2d 1195, 1200 (4th Cir. 1980); and *Central Power and Light Company v. United States*, 639 F.2d 1104, 1106 (5th Cir. 1981).

Rossmore House represents a material change in Board policy with regard to the issue of employer interrogation in this case. The Sheffield conversations cannot reasonably be held "coercive" under the facts and circumstances test of *Rossmore House*, in light of the non-coercive context of the conversations and the testimony of Vale. The failure of the Court of Appeals to apply the current Board standard, or in the alternative, to remand the case for the Board's reconsideration, denies Van Dorn the benefit of the application of the new Board rule to the unique facts of this case, is contrary to this Court's holding in *Food Store Employees Local 347*, and frustrates the Board's broad Congressional mandate to fashion remedies that will effectuate the purposes of the Act. *See, e.g., Shepard v. NLRB*, 459 U.S. 344 (1983).

Certiorari Should Be Granted to Redress the Board's Inability to Promulgate a Standard by Which to Judge Pre-Election Propaganda.

This Court has declared that it is the duty of the Board to establish procedures and safeguards necessary to

insure the fair and free choice of bargaining representatives. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). It has gone so far as to grant the Board wide discretion to ensure that free and fair choice [*NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969)], so long as the Board's action demonstrates a "consistent and contemporaneous construction" of the Act, *NLRB v. Boeing Co.*, 412 U.S. 67, 75 (1973). Where the Board has failed in that essential purpose, this Court has not hesitated to strike down standards incompatible with the spirit and meaning of the Act. *See, NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 276-77 (1973).

In the present case, the Board has shown itself to be totally incapable of fashioning a consistent and enduring standard by which to judge pre-election campaign statements of employers and unions. By changing its mind three times in the past seven years in this critical area of employer-employee relations without engaging in any rule-making procedure, the Board has displayed a cavalier attitude in its administration of the Act's promise of a free and fair election. Literally thousands of representation elections each year are conducted by the Board and thus subjected to its seemingly endless vacillation on this issue. As this case raises an important question of first impression in the administration of the Act, Van Dorn contends that certiorari should be granted. *Musicians Federation v. Wittstein*, 379 U.S. 171, 175 (1964).

The Board's first attempt to evaluate the truth and falsity of campaign propaganda occurred in *The Gummed Products Co.*, 112 N.L.R.B. 1092 (1955), in which it set aside an election where the union deliberately misstated wage rates it had negotiated with the employer's competitors. Seven years later, the Board further defined the

limits of campaign misrepresentations in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), by resolving to set aside an election where the prevailing party's misrepresentation, whether deliberate or not, involved a substantial departure from the truth or similar "campaign trickery", and was made at a time when the other party could not make an effective reply. 140 N.L.R.B. at 224.

Less than a month prior to the election in controversy in the present matter, the Board announced a dramatic change in policy. In *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), the Board declared that an election would be set aside only where a party had used forged documents or had physically altered an official Board document in such a manner as to suggest that the Board favored one of the parties and not where a party had made misleading campaign statements. Less than eighteen months later, the Board again reversed itself, reinstating its *Hollywood Ceramics* doctrine, in *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978). Three and one-half years later, *General Knit* was itself overruled as the Board decided to resurrect its prior *Shopping Kart* decision in *Midland National Life Insurance Company*, 263 N.L.R.B. 127 (1982).

While purporting to apply the *Midland National Life* rule to the facts in the present case, the Sixth Circuit disavowed any intention to be bound by that rule in future cases:

> Though we have no hesitation in upholding the Board's decision on the issue of misrepresentation in the present case we do share the First Circuit's reluctance to be bound by the *Midland National Life* rule in every case. There may be cases where no forgery can be proved, but where the misrepresentation

> is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made. *Midland National Life* at 131 . . . App. at A9.

In a similar manner, the First Circuit expressed approval of *Midland National Life* as applied to the facts presented in *NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1st Cir. 1983). That court also indicated that a broader rule more closely resembling the *Hollywood Ceramics* doctrine might be applied in future cases.

> . . . In so holding, however, we do not necessarily endorse application of the *Midland* rule to situations involving charges of more fundamental and clear-cut misrepresentations. The Board has a duty to provide reasonably for the employees' "unhampered freedom of choice". *International Association of Machinists Lodge No. 35*, 311 U.S. at 80, 61 S.Ct. at 88. Some misrepresentations may be so material and fraudulent as to undermine the employees' freedom of choice, rendering their section 7 right to self-organization a nullity. Were this such a case, the Board's flat insistence, under *Midland*, upon certifying the results of the fraudulent election might constitute legal error. 720 F.2d at 729.

Thus, two circuit courts have expressed dissatisfaction over the narrowness of the *Midland National Life* doctrine and have indicated that they will not necessarily defer to the Board's use of that standard in every case. On the other hand, several other circuit courts in upholding the *Midland*

National Life rule have done so without qualification except as to its retroactive application.[2]

The Board's inability to fashion a workable standard in the area of permissible election campaign conduct and to adhere to that standard has led to a predictable result: the prospect of differing standards being applied by the circuit courts in similar cases, as well as speculation that changes in Board personnel may result in yet another change in the standard. It will also inevitably have a profound effect in the labor-management arena where unpredictability of this sort will only encourage the adversaries to engage in the basest kind of campaign propaganda. While the Board has clearly abnegated its responsibility to articulate a uniform and consistent policy, this Court should not do so.[3]

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2. Second Circuit: *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2nd Cir. 1983).

Fourth Circuit: *National Posters, Inc. v. NLRB*, 720 F.2d 1358, 1363-64 (4th Cir. 1983).

Fifth Circuit: *NLRB v. Rolligon Corp.*, 702 F.2d 589, 594-95 (5th Cir. 1983).

Seventh Circuit: *NLRB v. Milwaukee Brush Mfg. Co.*, 705 F.2d 257, 258 (7th Cir. 1983).

Eighth Circuit: *NLRB v. Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983).

Ninth Circuit: *NLRB v. Yellow Transportation Company*, 709 F.2d 1342, 1343 (9th Cir. 1983).

Eleventh Circuit: *Certainteed Corp. v. NLRB*, 714 F.2d 1042, 1052-60 (11th Cir. 1983).

3. Van Dorn would argue that the proper standard to be applied in the present case is set forth in the Sixth Circuit's opinion in *Cascade Corporation v. NLRB*, 466 F.2d 748, 753-54 (6th Cir. 1972)—a standard which the Sixth Circuit inexplicably ignored in the present case. Under *Cascade*, an election shall be set aside where a party's campaign propaganda is found to constitute either a forgery or a material misrepresentation of fact such as to have an impact upon the election. The Nelson Flyer clearly falls within the *Cascade* definition of forgery, to wit:

(Continued on following page)

The Board has clearly shown itself to be undeserving of the deference usually shown by the courts to its policy standards. Under the standards set forth by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), inconsistent and contradictory pronouncements by an administrative agency are accorded little consideration. *See also, General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). The Board's continuing vacillation (committed in the context of adjudication, rather than rulemaking) in a critical area of labor-management relations does not promote the tranquility and stability in labor relations envisioned by the framers of the National Labor Relations Act.

The Decision of the Board and Lower Court Violates the Employer's Right of Free Speech.

In a letter addressed to employees of Van Dorn, Company President Sam Smith candidly stated the intention of Van Dorn to challenge the Union's certification in federal court. App. at A59. Both the Board and the court below held the letter to be a violation of §8(a)(1) of the Act. It is the contention of Van Dorn that both the Board and the court failed to consider the free speech protections guaranteed to the employer by the First Amendment to the United States Constitution and by §8(c) of the Act.

This Court has previously held that the employer's "free speech right to communicate his views to his employees is firmly established and cannot be infringed by

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Footnote continued—

> "[t]he fabrication or counterfeiting of evidence. The artful and fraudulent manipulation of physical objects, or the deceitful arrangement of genuine facts or things, in such a manner as to create an erroneous impression or a false inference in the minds of those who may observe them."

466 F.2d at 752.

a union or the Board". *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969). Section 8(c) of the Act merely seeks to implement the First Amendment protections of free speech by acknowledging the right of the employer to express an opinion so long as it does not contain a "threat of reprisal or force or promise of benefit" in violation of §8(a)(1). *Id.* The permissible scope of the employer's expression, therefore, must be analyzed within the "context of its labor relations setting" and necessarily requires a balancing of the employer's free speech rights with the employee's rights to associate without fear of employer retaliation or coercion. *Id.*

The Board clearly did not employ such a balancing test in the present case. It adopted a finding that since the employer's technical refusal to bargain was not justified, its communication to employees that it had resolved to pursue that course of action was itself a violation of the Act. Supp. App. at S164. Such tortured logic emasculates the free speech protections of §8(c) depriving the employer of those protections should his technical refusal to bargain subsequently be rejected by the Board. The employer's entitlement to the protections of §8(c) should not be made to hang from so thin a thread.

This Court has acknowledged that the employer's only means of challenging the Board's certification of a union is by engaging in a technical refusal to bargain. *See, Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). Van Dorn's letter merely stated its intention to pursue the only legal alternative open to it to test the Union's certification. Circuit courts, including the Sixth Circuit, have held that an employer may inform employees of their fundamental rights under the Act. *See, e.g., Landmark International Trucks, Inc. v. NLRB*, 699 F.2d 815, 820 (6th Cir. 1983)

(Employee letter advised employees of right to resign from union and to revoke dues checkoff authorizations); *Florida Steel Corporation v. NLRB*, 587 F.2d 735, 750-53 (5th Cir. 1979) (Employer letter informed employee of right to have attorney present before making statements to Board agents).

The letter in the instant case contained no threat of reprisal or force and did not promise employees any benefit. In fact, neither the Board nor the court made any specific finding in this regard—a finding which is essential to overcoming the protections of §8(c). Van Dorn merely announced its intention to exercise its fundamental right to seek review of the Union's certification in the courts. If the letter is read in the context of the immediate situation, it is clear that Van Dorn was merely correcting misinformation given to its employees by the Union. Such an expression is clearly protected speech under §8(c) and does not constitute a violation of §8(a)(1). In fact, it does not even rise to the level of an employer's announced resolve to use every lawful means to avoid unionization—a statement deemed proper under the Act. *See, L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1347 (9th Cir. 1980).

The Board and the court below have clearly ignored this Court's admonitions in *Gissel Packing* by failing to balance the employer's free speech rights with the protected rights of the employees. Every employer has the right protected by §8(c) of the Act to explain to its employees the reasons for its decision to engage in a technical refusal to bargain and the consequences thereof. Unless this Court acts to rectify the Board's deprivation of Van Dorn's rights of free speech, employers will be frustrated in their attempts to communicate with employees once a

technical refusal to bargain is pursued by the employer.[4] To paraphrase this Court's holding in *Gissel Packing*, neither the union, the Board, nor the courts may abridge that right.

It is ironic that at the very moment the Board chooses to give First Amendment rights free reign through the readoption of its "laissez-faire" approach with respect to representation election campaigns, it also deprives the employer of its First Amendment rights to communicate with its employees in the post-election context. The Board's decision concerning the Smith letter operates as nothing less than an administratively imposed "gag rule" upon Van Dorn's rights of free speech. This Court recently noted that restrictions on the free exchange of views and ideas must be "demonstrably supported not only by a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing the protected expression". *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982). Indeed the preferred First Amendment remedy is "more speech, not enforced silence". 456 U.S. at 61.[5]

The Board has shown no compelling interest justifying restrictions on Van Dorn's constitutionally protected right to engage in the free exchange of ideas with its employees.

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4. This is not an insignificant concern—for the Board's order in this case prohibits Van Dorn from urging its employees not to strike and from explaining the basis for its technical refusal to bargain. Such a "gag" order simply cannot withstand First Amendment scrutiny.

5. Van Dorn's argument applies with equal force to the Sheffield conversations discussed above. The Board's recent decision in *Rossmore House* in fact acknowledges the strong First Amendment interest in protecting employer communications with employees, citing this Court's decision in *Gissel Packing*. *See*, 116 L.R.R.M. at 1026-27.

Its myopic view of employer communications with employees is clearly antithetical to this Court's expansive reading of the First Amendment's protections. The Board offers no justification for its unprecedented abridgement of Van Dorn's right of free speech—and indeed can offer none. Its response to Van Dorn's attempt to correct the Union's factual misstatement of the Company's position was to stifle Van Dorn's right of free speech. This Court's First Amendment precedents clearly do not adopt such a view. This Court has clearly struck the balance in favor of "more speech, not enforced silence". This principle must be applied in the present case.

CONCLUSION

For all the foregoing reasons, the Court should grant the petition and issue a writ of certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: October 18, 1984

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 8, 1984)

No. 83-5012
No. 83-5118

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION to Review and Cross Application to Enforce a Decision and Order of the National Labor Relations Board.

Before: LIVELY, *Chief Judge;* JONES and CONTIE, *Circuit Judges.*

LIVELY, *Chief Judge,* delivered the opinion of the Court in which JONES, *Circuit Judge,* joins. CONTIE, *Circuit Judge,* (pp. 14-16) delivered a separate opinion concurring in part and dissenting in part.

LIVELY, *Chief Judge.* The most important issue in this labor case relates to the proper standard for determining whether communications from a union or an employer near the time of a representation election are sufficiently deceptive to require setting the election aside. After much

vacillation the National Labor Relations Board (the Board) appears to have settled on a standard, stated in *Midland National Life Insurance Co.*, 263 NLRB No. 24 (1982), as follows:

> In sum, we rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. As was the case in *Shopping Kart*, we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice.

I.

Van Dorn Plastic Machinery Company (Van Dorn) refused to bargain with District 54 of the International Association of Machinists and Aerospace Workers (the Union) following a Board-conducted election at which 151 employees at its Strongsville, Ohio, plant voted for the Union and 131 voted against it. In timely objections to the election Van Dorn charged several irregularities, including the allegation that the Union had distributed a flyer on election day which, while purporting to show that employees of another company had received favorable wage rates and benefits from a Union-negotiated contract, was in fact a forgery.

The Board's regional director conducted an investigation, without a hearing, and issued a recommendation that

all of the objections be overruled. The Board adopted the regional director's findings and recommendation and certified the Union as the exclusive bargaining representative of Van Dorn's production and maintenance employees. The decision which finally brought the dispute to this court resulted from an amended complaint which consolidated several unfair labor practice charges which the Union filed in the wake of the election. In addition to charging Van Dorn with refusal to bargain with the certified representative of its employees, the Union charged the employer with unfair labor practices consisting of unilaterally changing its paid lunch period policy and unilaterally implementing a new attendance control policy, both without prior bargaining with the Union, and unlawfully interrogating and coercing employees.

Two hearings on the charges were held before an administrative law judge (ALJ), the second pursuant to a remand by the Board. Following the second hearing the ALJ issued a decision recommending a finding that the Union had misrepresented the actual negotiated wage rates in the flyer, but that the misrepresentation was not so substantial as to have significantly affected the election results. The ALJ thus determined that the certification was valid and that Van Dorn had violated section 8(a)(1) and (5) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1) and (5) (1976) by refusing to bargain with the Union. The ALJ also found that Van Dorn had interrogated and coerced employees in violation of section 8(a)(1), but that it had not violated section 8(a)(5) by implementing an attendance control policy and changing its paid lunch policy without prior bargaining. However, the ALJ did find that Van Dorn had violated section 8(a)(5) by not bargaining about the effects of the change in lunch policy.

II.

A.

In *Midland National Life*, the Board traced the history of its treatment of campaign propaganda. In the early years under the Wagner Act the Board disregarded issues of truth or falsity of campaign propaganda, assuming that employees would recognize propaganda for what it was, and discount it. *Midland National Life* at 129. Following passage of the Taft-Hartley Act the Board shifted its stand and set aside elections where it found that employees were deceived by trickery or fraud as to the source of campaign propaganda and were unable to recognize or evaluate propaganda. See *United Aircraft Corporation*, 103 NLRB 102 (1953). Another change in the Board's treatment of campaign propaganda occurred in *Hollywood Ceramics Company*, 140 NLRB 221 (1962). There the rule was announced that an election would be set aside "where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." *Id.* at 224.

Fifteen years later the Board overruled *Hollywood Ceramics*, stating in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), that it would "no longer probe into the truth or falsity of the parties' campaign statements" but would intervene "in instances where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is." *Id.* at 1311, 1313. Incredibly, the Board overturned *Shopping Kart* and reinstated the

Hollywood Ceramics standard less than two years later in *General Knit of California, Inc.*, 239 NLRB 619 (1978), and then reversed itself again in *Midland National Life*, returning to the rule of *Shopping Kart*. When the first hearing before the ALJ in the present case took place the *Shopping Kart* standard prevailed. On the last day of that hearing the *General Knit* decision was issued. By the time this case reached the Board for its final decision, *General Knit* had been discarded in favor of a return to the *Shopping Kart* standard in *Midland National Life*.

B.

Applying its recently announced *Midland National Life* rule, the Board held that the election day flyer was not a forgery and, without analyzing the truth or falsity of the statements which it contained, determined that "the Union's campaign material involved here was not objectionable. . . ." The Board thus upheld the finding of the ALJ that Van Dorn violated section 8(a)(5) by its refusal to bargain with the Union. The Board also upheld the findings of the ALJ that Van Dorn violated section 8(a)(1) by interrogating and coercing employees and by refusing to bargain with the Union on the effects of its unilateral change in the paid lunch policy. However, the Board disagreed with the ALJ in two respects. It found the unilateral change in Van Dorn's paid lunch policy during the pendency of its exceptions to the regional director's findings on its objections to the election to be a violation of section 8(a)(5) and (1). The Board also found the announcement of a change in Van Dorn's attendance control system in June 1978 a violation of section 8(a)(5) and (1). Van Dorn was ordered to cease its unfair labor practices, to recognize, and upon request, meet and bargain with the Union and to post a notice to its employees. The

decision and order of the Board appear at 265 NLRB No. 36 (1982). Van Dorn filed a petition to review the decision and order, and the Board filed a cross-application for enforcement.

III.

A.

We agree with the ALJ that the flyer which was distributed by the Union shortly before the election contains misrepresentations concerning wage rates and, possibly, the identity of the union involved with the other employer. However, it is not a forgery. It is a memorandum to Van Dorn employees on IAM District Lodge 54 letterhead which purports to answer representations made in a pamphlet previously distributed by Van Dorn. An attached sheet lists job classifications and wage rates along with several excerpts from a collective bargaining agreement.

Van Dorn argues that the page of excerpts is a forged document because it is not clear what is real and what is fabricated. It also argues that it is a forgery because the Union intentionally blocked out the identity of the contracting local to give the impression that the agreement involved a near-by plant. In fact, the wage rates listed were those of a plant in California and were a compilation of base rates and premiums. As presented, the listed rates overstated the actual wages being paid. Anyone who examined the document would consider the list as having been taken from the collective bargaining agreement. Nevertheless, it was not a forgery merely because the rates presented were a compilation of the negotiated base rates and premiums. There was no claim by the Union that the listing was complete or that it was anything more than an example of the rates in one of IAM's contracts.

Nor was it a forgery merely because the identity of the contracting local had been obscured. Measured by the *Midland National Life* standard, the Union flyer does not constitute a proper basis for setting aside the election.

B.

There remains the question of whether the *Midland National Life* standard should be adopted by this court. The Board enjoys a particularly broad discretion "in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946) (citations omitted). Our review of the Board's decision to narrow the instances in which an election will be set aside on the ground of campaign misrepresentations is limited to determining whether there has been an abuse of discretion. The test for determining whether the Board has abused its discretion is whether its orders have a "reasonable basis in law." Board orders have been held to have no reasonable basis in law, "either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

The purpose of any rule relating to representation elections is to insure that employees have an opportunity to make a free and fair choice, that their right under section 7 of the Act, 29 U.S.C. § 157 (1976), "to bargain collectively through representatives of their own choosing," is preserved. In *Midland National Life* the Board concluded that while the *Hollywood Ceramics* standard had been difficult to apply the *Shopping Kart* decision drew a clear line between permissible and objectionable propaganda and established a standard which "lends itself to definite results

which are both predictable and speedy." *Midland National Life* at 131. The Board felt that this rule greatly reduced the incentive for protracted litigation and the resulting uncertainty which surrounds a contested election. In addition, the Board found that a return to its earliest attitude toward campaign propaganda represented a better understanding of the ability of employees to recognize and deal with campaign propaganda realistically. *Id.* at 132.

In *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886 (2d Cir. 1983), the court dealt with allegations of misrepresentations concerning potential benefits of unionization. Though it found the misrepresentations trivial, and not objectionable under the more lenient standard of *Hollywood Ceramics*, the court specifically accepted the Board's *Midland National Life* rule. In doing so it noted the wide discretion given to the Board by Congress and the reasons for returning to the *Shopping Kart* rule as stated in *Midland National Life*, and concluded:

> There was thus a "reasonable basis in law" for the Board's return to the *Shopping Kart* analysis, and we defer to that decision. *See NLRB v. Hendrick's County Rural Electric Corp.*, 454 U.S. 170, 176, 102 S.Ct. 216, 221, 70 L. Ed.2d 323 (1981).

721 F.2d at 892. The same approach was taken by the court in *NLRB v. Monark Boat Co.*, 713 F.2d 355, 360 (8th Cir. 1983), in electing to defer to the decision of the Board. The court in *NLRB v. Yellow Transportation Company*, 709 F.2d 1342 (9th Cir. 1983) (per curiam), applied *Midland National Life* without discussion.

Reacting somewhat differently, *in NLRB v. New Columbus Nursing Home, Inc.*, 720 F.2d 726 (1st Cir. 1983), the court applied the *Midland National Life* rule but adopted the rule "only with respect to the situation arising in

the instant case." *Id.* at 728. In applying the rule the court concluded that the alleged misrepresentation "was scarcely likely to have affected the employees' free and fair choice." *Id.* at 729. In refusing to be bound by *Midland National Life* in all cases the court stated:

> Some misrepresentations may be so material and fraudulent as to undermine the employees' freedom of choice, rendering their section 7 right to self-organization a nullity. Were this such a case, the Board's flat insistence, under *Midland,* upon certifying the results of the fraudulent election might constitute legal error.

Id. Senior Judge Bailey Aldrich concurred specially, finding the *Midland National Life* rule "an abnegation of the Board's recognized duty to ensure a fair and free choice of bargaining." *Id.* at 730.

Though we have no hesitation in upholding the Board's decision on the issue of misrepresentation in the present case we do share the First Circuit's reluctance to be bound by the *Midland National Life* rule in every case. There may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made. *Midland National Life* at 131. Thus considered the Board did not abuse the "wide degree of discretion" granted by Congress in rejecting Van Dorn's objections to the election. See *NLRB v. Basic Wire Products, Inc.,* 516 F.2d 261 (6th Cir. 1975).

IV.

The Board disagreed with the ALJ's treatment of two of the unfair labor practices charges relating to unilateral changes in Van Dorn's paid lunch period and attendance control policies. Section 8(d) of the Act, 29 U.S.C. § 158(d) (1976), requires collective bargaining "with respect to wages, hours, and other terms and conditions of employment." A unilateral change with respect to a mandatory bargaining subject is a violation of section 8(a)(5). *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981); *NLRB v. Allied Products Corp.*, 548 F.2d 644, 652 (6th Cir. 1977).

A.

Prior to certification but after the election Van Dorn eliminated paid lunch periods for approximately 35 employees without offering to bargain on this issue with the Union. At the initial administrative hearing on the complaint, General Counsel for the Board and Van Dorn's counsel stipulated in writing that the change was made "due to business necessity." Van Dorn agrees that its paid lunch policy is "a condition of employment" and that it acted unilaterally. However, it takes the position that the stipulation brought it within a recognized exception to the bargaining requirement which permits unilateral changes based on "compelling economic considerations." See *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703 (1974), *enf. denied on other grounds*, 512 F.2d 684 (8th Cir. 1975). The ALJ construed the stipulated reason for the change in lunch policy—"business necessity"—as the equivalent of "compelling economic considerations." Thus, he excused Van Dorn from bargaining on the change, while requiring it to bargain on the effects of the change.

The Board found that the stipulation did not satisfy the "compelling economic considerations" exception. On appeal Van Dorn argues that the stipulation was binding, and giving the words their ordinary meaning, clearly brought its action within the exception. It is not clear from this record what the parties intended when they entered into the stipulation. However, a stipulation once entered into should be construed to give it legal effect. *National Audubon Society, Inc. v. Watt,* 678 F.2d 299, 307 (D.C. Cir. 1982). A remand is necessary to determine the correct interpretation of the stipulation. Van Dorn proceeded on the assumption that the stipulation relieved it of the duty to justify its failure to bargain on the change in lunch periods. The ALJ so construed the stipulation. If the stipulation is found to be ambiguous the Board must consider extrinsic evidence of the intention of the parties in entering into it. If the Board finds from such evidence that no agreement was actually reached and that the stipulation is a nullity, then fairness requires that Van Dorn be given an opportunity to establish "compelling economic considerations." In considering this question the Board would be required to categorize the lunch period action within the holding of *First National Maintenance Corp.,* 452 U.S. 666 (a decision which is "almost exclusively 'an aspect of the relationship' between employer and employee" must be bargained but a decision which only has an "indirect and attenuated impact on the relationship" or is made to preserve the business and involves a fundamental change in scope or direction need not be bargained). Regardless of the outcome of the remand, we affirm the Board's holding that Van Dorn is required to bargain with respect to the effects of the lunch period decision. *Id.* at 677-78 n. 15; see *NLRB v. Gray-Grimes Tool Co.,* 557 F.2d 1233 (6th Cir.), *cert. denied,* 435 U.S. 907 (1977).

B.

In June 1978 Van Dorn published a system for controlling employees attendance. It consisted of charging "points" for each absence or tardiness, with disciplinary action following the accumulation of seven points. When an employee complained that the policy had not been published previously, Van Dorn agreed to expunge all records of prior violations and announced that the policy would be effective July 1, 1978.

In his amended consolidated complaint the General Counsel alleged that Van Dorn violated section 8(a)(1) and (5) of the Act, "in or about June 1978" by unilaterally implementing a new attendance control policy. At the administrative hearing Van Dorn's director of employee relations testified that the point system announced in June had been in effect since January 1978. A point system had been maintained earlier, but the practice of recording absences and tardiness in effect at the time of the hearing had been implemented in January 1978. Upon inquiry by the ALJ, counsel for the General Counsel continued to maintain that the system had been implemented in June 1978 and that he was not seeking to amend the complaint. The ALJ found that the point system had been in effect for at least six months prior to June 1978 and that no issue had been presented of a unilateral act as of January. He specifically credited the testimony of the Van Dorn official and concluded that merely publicizing the pre-existing system did not constitute an unlawful unilateral change in the absence of an allegation or proof that Van Dorn had publicized the policy in an effort to undermine the Union. No such allegation or proof appears in the record.

The Board disagreed with the conclusion of the ALJ and found that the General Counsel had made a prima facie case of an unlawful unilateral change in working conditions and that Van Dorn had failed to refute the prima facie case. It is unclear whether the Board found that publication of the attendance policy in June constituted a change in June 1978 or whether it concluded that it was sufficient that some change had been made after the election, probably in January 1978. We can find no evidence that a change was made in the employee attendance control system in June 1978. A finding of such a change on this record would not be supported by substantial evidence. If the Board based its decision on this issue upon a finding that the attendance control system was changed sometime prior to June 1978, the decision cannot stand. We agree with Van Dorn's contention that the Board abused its discretion if it permitted a constructive amendment to the complaint, particularly after counsel had confirmed that he was charging a unilateral change in June 1978. Further, a change in January would have been more than six months prior to the filing of the charge and would be barred under section 10(b) of the Act, 29 U.S.C. § 160(b) (1976).

It appears that there are no circumstances which would take this charge outside the six-months limitation bar. We do not need to explore that possibility, however, because it is clear to this court that the General Counsel never charged Van Dorn with a violation at any time other than June 1978 and that the hearing was conducted on the basis of that charge. This issue is controlled by our recent decision in *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984). Reviewing a similar set of circumstances, we denied enforcement of one of the unfair labor practice charges, stating:

> The fundamental fairness inherent in administrative due process cannot permit the General Counsel to plead a certain charge, insist at hearing that only that charge is being litigated, and then raise a related, but more onerous charge only after the hearing record is closed.

Id. at 544 (citations and footnote omitted). *Accord S.S. Kresge Company v. NLRB*, 416 F.2d 1225, 1234-35 (6th Cir. 1969).

V.

Van Dorn also asserts that the findings of violations of section 8(a)(1) in unlawful interrogation, restraint and coercion of employees are not supported by substantial evidence. We have examined the record with respect to these charges and conclude that the findings are supported by substantial evidence. Accordingly the Board's order will be enforced in this respect.

Other arguments by Van Dorn have been considered and found to be without merit.

CONCLUSION

Enforcement of the Board's order is denied insofar as it finds a violation of the Act consisting of a unilateral implementation of an attendance control policy. The Board's order is vacated insofar as it finds a violation of the Act in Van Dorn's implementation of a lunch period policy, and we remand for further proceedings. In all other respects the order of the Board is enforced. The Notice to Employees will be modified to reflect this court's decision. No costs are allowed in these proceedings.

CONTIE, Circuit Judge, concurring and dissenting. I fully agree with the majority's analysis of all issues presented in this case except one. Accordingly, I join in the majority opinion in every respect except for its determination of Part V that Van Dorn Vice-President William Sheffield, violated § 8(a)(1) by interrogating employee Thomas Vale. I conclude that Sheffield's conversation with Vale was not unlawful.

Strike votes were held by the Union on April 2, 1978 and May 7, 1978. Prior to each of these votes, Sheffield approached Vale at the latter's work station. Vale testified that Sheffield asked him on each occasion if he thought that the employees would vote in favor of a strike. Vale further testified that Sheffield stated that the employees did not need to strike and did not need a Union. Absent other evidence, these remarks would constitute substantial evidence of a § 8(a)(1) violation. Additional testimony of Vale, however, demonstrates that these conversations were not coercive.

One must begin with the proposition that, since an employer has the right to question employees in a non-coercive manner, *see NLRB v. Streamway Division*, 691 F.2d 288, 296 (6th Cir. 1982), an employer's questioning of an employee is not per se unlawful. *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 548 (6th Cir. 1984); *NLRB v. Price's Pic-Pac Supermarkets, Inc.*, 707 F.2d 236, 239 (6th Cir. 1983); *NLRB v. Armstrong Circuit, Inc.*, 462 F.2d 355, 357 (6th Cir. 1972). Generally, "[i]n determining whether the . . . particular questioning . . . violates the Act we look to all the surrounding circumstances to determine whether it may reasonably be said that the interrogation 'tends to interfere with the free exercise of employee rights under

the Act.'" *Armstrong Circuit,* 462 F.2d at 357 (quoting *Hughes & Hatcher, Inc. v. ILRB,* [sic] 393 F.2d 557, 563 (6th Cir. 1968)).

The single most important factor I rely on in concluding that Sheffield's conversation with Vale did not violate the Act is Vale's testimony that he did *not* feel coerced by Sheffield's questioning.[1] The rule that the Board does not have to show that an "employee was in fact intimidated," *see NLRB v. Electric Steam Radiator Corp.,* 321 F.2d 733, 736 (6th Cir. 1963), and that the Board need only show that a given conversation "tends to interfere" with an employee's rights, *see Armstrong Circuit,* 462 F.2d at 357, has no application to a case in which the employee in question affirmatively testifies as to his subjective mental state at the time of the conversation. If the content and tenor of a given conversation "tends to interfere" with an employee's rights, we will infer, in the absence of evidence to the contrary, that the conversation was in fact coercive. Thus, it is true in such cases that the Board does not need to prove that the "employee was in fact intimidated." In the present case, however, there is evidence which squarely rebuts the inference of coercion: Vale's own testimony.

Several other elements of Vale's testimony add support to the conclusion that he was not coerced. First, in

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1. Vale testified as follows:

Q. Let me ask if during either conversation you had with Mr. Sheffield you felt intimidated in any way?

A. By Mr. Sheffield?

Q. Yes, sir.

A. He just asked me a question and I just answered it.

Q. But you didn't feel afraid, did you?

A. Afraid?

Q. Yes.

A. No, sir.

responding to Sheffield's inquiry as to the likelihood of a strike, Vale told Sheffield that he thought the employees probably would strike and then made a joke: "We wouldn't mind if you would save the old skids back there. We need it for a bonfire." Vale testified that Sheffield laughed at this remark. Second, Vale testified that he told Sheffield that he thought one of the supervisors should be fired. Third, there was nothing in Vale's testimony indicating that Sheffield made any statements which could be construed as an overt threat. Fourth, Sheffield did not question Vale about his personal feelings about a strike, only about the likelihood of a strike. Fifth, Sheffield commonly talked to employees and the conversation occurred at Vale's work station, where Vale presumably felt at ease, and not in Sheffield's office.

All of these factors lead to the conclusion that there was nothing coercive about Sheffield's conversation with Vale. Moreover, Vale's own testimony directly and expressly supports this conclusion. I would conclude that the Board's finding that this conversation was a violation of § 8(a)(1) of the Act is not supported by substantial evidence on the record considered as a whole.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Dated December 14, 1982)

[265 NLRB No. 36]

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

VAN DORN PLASTIC MACHINERY CO., DIVISION OF VAN DORN COMPANY	Cases 8-CA-11669, 8-CA-11842, and 8-CA-12243
and	
DISTRICT LODGE 54 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL—CIO	
and	Case 8-CA-12205
THOMAS W. VALE, an Individual	

DECISION AND ORDER

On November 12, 1980, the National Labor Relations Board issued its Order Remanding Proceeding to the Administrative Law Judge.[1] Thereafter, on May 18, 1981, Administrative Law Judge Robert G. Romano issued the attached Supplemental Decision in this proceeding. Subsequently, Respondent filed exceptions and a supporting

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1. 253 NLRB 268.

brief, and the Charging Party Union filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision and Supplemental Decision in light of the exceptions and briefs filed after the Administrative Law Judge's initial Decision[2] and after his Supplemental Decision and has decided to affirm his rulings, findings, and conclusions,[3] as modified herein, and to adopt his recommended Order, as modified below.

The Administrative Law Judge originally decided, *inter alia*, that the Union had made a material misrepresentation which affected the outcome of the election. Although *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), was prevailing law at the time the Regional Director considered Respondent's objections to the election, the Administrative Law Judge applied the test set forth in *General Knit of California, Inc.*, 239 NLRB 619 (1978), which issued while the unfair labor practice case was pending before the Administrative Law Judge. On review, the Board agreed that retroactive application of the *General Knit* standard was proper, but remanded the case for further hearing, on the alleged misrepresentation. Subsequent to such hearing, the Administrative Law Judge issued his

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2. In its Order remanding this proceeding, the Board stated that it would consider the exceptions raised to the Administrative Law Judge's initial Decision after he had issued his Supplemental Decision. See 253 NLRB at 269, fn. 9.

3. We adopt, *pro forma*, in the absence of exceptions, the Administrative Law Judge's finding that Respondent did not violate an employee's right under *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

Supplemental Decision, which is now before us for consideration.

On August 4, 1982, a Board majority overruled *General Knit* and returned to the rule of *Shopping Kart. Midland National Life Insurance Co.*, 263 NLRB No. 24. The Board also stated that, in accord with its usual practice, the new policy would be applied retroactively to all pending cases, no matter what stage they were in. (*Id.* sl. op., p. 21 at fn. 24.) Thus, since the Board will no longer analyze the truth or falsity of campaign statements, and will not set aside elections on the basis of misleading statements, we conclude that the Union's campaign material involved here was not objectionable, and that, therefore, the Union was properly certified as the collective-bargaining representative of Respondent's production and maintenance employees.[4] Accordingly, we agree with the Administrative Law Judge's conclusion that Respondent's general refusal to bargain with the duly certified representative of its employees is in violation of Section 8(a)(5) of the Act.

We now turn to a consideration of the remaining 8(a)(5) allegations and the various 8(a)(1) allegations at issue in this proceeding.

In his initial Decision, the Administrative Law Judge found that Respondent had violated Section 8(a)(1) by interrogating employees and by urging them not to support a strike, and by telling employees that it would never recog-

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4. As noted, above, *Shopping Kart* principles have previously been applied to the facts of this case.

Members Fanning and Jenkins adhere to their dissenting opinion in *Midland National, supra,* but consider themselves institutionally bound to apply the majority standard of that case until such time as it is reversed. Additionally, they would find, in agreement with the Administrative Law Judge's opinion in his Supplemental Decision, that the Union's campaign material was not objectionable under the *General Knit* standard.

nize the Union and that it would be useless for employees to go out on strike. We agree with these unfair labor practice findings.

In his original Decision, the Administrative Law Judge also made alternative findings, in the event that the Board found that the Union was, in fact, the proper bargaining representative in this proceeding. As the Administrative Law Judge in his Supplemental Decision has now found the Union is, in fact, the duly certified bargaining representative, he has entered the following findings with which we agree: (a) Respondent violated Section 8(a)(1) by telling employees that it would not bargain with the Union until the Federal courts determined if the election was a fair one; and (b) Respondent violated Section 8(a)(5) by failing to bargain with the Union concerning the effects of Respondent's unilateral change in its paid lunch policy, and by failing to supply certain information requested by the Union on March 7, 1978.

However, for the reasons that follow, we do not agree with the Administrative Law Judge's conclusion that Respondent did not violate its duty to bargain in two other respects.

1. The Unilateral Change in the Lunch Policy

The election in this case was conducted on April 22, 1977.[5] The Union received a majority of the ballots cast, and Respondent filed objections to the election on April 28. On May 27, the Regional Director recommended that the objections be overruled, and, on June 8, Respondent filed exceptions to that recommendation. On January 17, 1978, the Board adopted the Regional Director's findings

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5. All dates in this section are in 1977 unless otherwise indicated.

and recommendations and issued its Certification of Representative.

On October 7, during the pendency of its exceptions concerning the objections to the election, Respondent unilaterally changed its policy with respect to paid lunch periods. Respondent neither notified nor consulted with the Union about the change. Moreover, the Union never waived its right to bargain about the new policy. Approximately 35 employees were affected by the change in policy. It was stipulated at the hearing that Respondent instituted the change due to "business necessity."

In determining whether this unilateral change violated the Act, the Administrative Law Judge recognized the prevailing Board rule which holds that an employer acts at its peril when it unilaterally changes terms and conditions of employment while objections to an election are pending. Such changes ordinarily violate the Act if the union is ultimately certified.[6] However, the Administrative Law Judge focused on the Board's further statement in *Mike O'Connor Chevrolet* that "compelling economic considerations" could justify a unilateral change which might otherwise be prohibited. (*Id.* at 703.) He then concluded that the "business necessity" stipulated as the reason for the change here encompassed the "compelling economic considerations" envisioned by the Board in *Mike O'Connor Chevrolet*, and that therefore Respondent did not violate Section 8(a)(5) and (1) of the Act. We do not agree.

The Board has repeatedly held that economic expediency or sound business considerations are insufficient defenses to justify unilateral changes in terms and con-

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6. *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., et al.*, 209 NLRB 701, 703-704 (1974), *reversed on other grounds* 512 F.2d 684 (8th Cir. 1975).

ditions of employment.[7] Once the General Counsel has made a *prima facie* showing of an 8(a)(5) violation—as has been done here—a respondent must demonstrate why the refusal to bargain was privileged. In the instant case, Respondent was responsible for showing that "compelling economic considerations" warranted its acting unilaterally. This, it has not done here.

Contrary to the Administrative Law Judge, we do not believe that the term "business necessity," without more, encompasses the concept of "compelling economic considerations." Indeed, the fair import of the Board's statements in *Mike O'Connor Chevrolet* is that the circumstances amounting to "compelling economic considerations" would be rare. Thus, "business necessity" may well encompass considerations beyond the realm of "compelling economic considerations." Indeed that which makes good "business" sense is not at all the equivalent of a "compelling economic consideration." The stipulation entered into by Respondent is simply insufficient to allow us to evaluate in light of our prevailing standard Respondent's reasons for the change. Therefore, we find Respondent's asserted defense, without more, falls short and we conclude it violated Section 8(a)(5) and (1) of the Act by changing its paid lunch policy.[8]

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7. *Han-Dee Pak, Inc.*, 249 NLRB 725 (1980); *Master Slack and/or Master Trousers Corp.*, 230 NLRB 1054 (1977). Indeed, in the context of unilateral modifications of existing contract terms, the Board has held that an "economic crisis" was an irrelevant defense to an alleged 8(a)(5) violation. *Oak Cliff-Golman Baking Company*, 207 NLRB 1063 (1973).

8. Member Zimmerman would adopt the Administrative Law Judge's recommendation to dismiss the alleged 8(a)(5) violation concerning Respondent's change of its paid lunch policy. In his view, the distinction drawn by the Board between "business necessity" and "compelling economic consideration" is unsupportable. The stipulation that Respondent's action in this regard was motivated by "business necessity" plainly encompasses more than the "good 'business' sense" the majority passes it off as. Had the stipulation meant what his colleagues say it means, Member Zimmerman would not hesitate to join them. The plain language of the stipulation, however, prohibits such a finding.

2. The change in the absentee control system

The Administrative Law Judge also determined that Respondent did not unilaterally institute a new absentee control system in June 1978.[9] He concluded, *inter alia*, that the the [sic] system antedated the announcement of the plan to employees, and that the mere publication of the plan by Respondent did not violate the Act. We do not agree.

The General Counsel presented evidence that Respondent, in June, sent a letter to employees outlining how its "absence control" program was administered because, as the letter explained, of "some confusion as to how the attendance program works." The letter stated the "program has been in use at several Van Dorn plants for a number of years," and explained the weighting factors for categories of absences.[10] The letter also prescribed the disciplinary procedure to be followed when an employee reached a weighted total of seven points under the absence categories.

Although Respondent presented contradictory evidence about when the seven-point disciplinary program became effective at the plant involved here, the Administrative Law Judge credited the testimony of Employee Relations Manager Kupec that the system had been in effect since "at least" January. In July, however, in response to an employee complaint that the new attendance policy had been made retroactive to January without notification to employees, Kupec signed a document on behalf of Respondent stating that the effective date of the program explained in the letter mentioned above was July 1.

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9. All dates in this section are in 1978 unless otherwise indicated.

10. For example, an employee would receive no points for an excused absence, and two points for an unexcused absence.

We agree with the General Counsel that a *prima facie* violation of the Act has been made out here. As the Administrative Law Judge found, employees generally, and even some supervisors, were not aware of Respondent's use of the strict point attendance system. Thus, the publication of the program to employees presented, to them, a new attendance policy. Since Respondent neither notified nor bargained with the Union concerning the policy, which clearly affected terms and conditions of employment, the change of the policy as announced to employees presented a *prima facie* violation of Section 8(a)(5). Contrary to the Administrative Law Judge, we do not believe that Respondent has sufficiently rebutted this *prima facie* case.

The Administrative Law Judge found the point system had been in effect since January. This fact itself reflects that Respondent changed its system during the pendency of objections. That employees did not complain about the system until June merely indicates that Respondent never notified employees, or the Union, of the new system until it sent the letter to employees in June. While it may be arguable that the mere publication of a previously unadvertised but existing discipline policy is not in and of itself a violation of the Act,[11] the notification and enforcement of a new system is undeniably still a unilateral change in terms and conditions of employment. Moreover, irrespective of Respondent's prior use of the seven-point attendance policy, Respondent informed at least one employee that the system was not effective until July 1. The Administrative Law Judge recognized this fact, but found that Respondent was starting fresh records for all employees "inasmuch as [Respondent was] publishing the program for the first time to all employees . . . ."

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11. But see *Hedstrom Company, a subsidiary of Brown Group, Inc.*, 235 NLRB 1198, 1208 (1978); *Southland Paint Company, Inc.*, 157 NLRB 795, 796 (1966).

Although this "forgiveness," as the Administrative Law Judge characterized it, was not alleged as a violation of the Act, it illustrates the change in the system Respondent was installing. In sum, Respondent has all but conceded there was *some* change in the attendance system. It neither notified nor bargained with the Union about the change, and thereby violated Section 8(a)(5) and (1) of the Act.

Amended Supplemental Conclusions of Law

Delete paragraphs 3(5)(b) and 3(6) of the Administrative Law Judge's Supplemental Conclusions of Law and add the following to paragraph 3:

"(b) By refusing, on and after February 22, 1978, to recognize, meet, and bargain with the Union as the certified exclusive bargaining representative of the above unit of employees, including refusing to meet and bargain with the Union over the decision to change its paid lunch policy and the effects of Respondent Employer's unilateral change in its paid lunch policy for certain employees; and by refusing, commencing on or about March 7, 1978, to furnish the Union with certain requested data relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all employees of the Respondent in the above appropriate unit, Respondent has violated Section 8(a)(5) and (1) of the Act."

"(d) By unilaterally changing its absentee/tardiness policy, Respondent has violated Section 8(a)(5) and (1) of the Act."

Amended Remedy

Having found that Respondent unlawfully unilaterally changed its paid lunch policy, we shall order Respondent to make employees whole for any loss of benefits from Re-

spondent's unlawful conduct. Interest on the amount lost shall be computed in the manner prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).) We shall also order Respondent to restore the status quo by rescinding its unilateral change. Having also found that Respondent unlawfully unilaterally instituted a change in its attendance/tardiness program, we shall order that Respondent fully restore the status quo which existed at the time of its unlawful actions by rescinding and expunging from its records all disciplinary actions resulting from the unlawful change, and that Respondent make whole the employees adversely affected by Respondent's unilateral change in its attendance/tardiness program including, as appropriate, immediate and full reinstatement to their former jobs, or, if those jobs are unavailable, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges. We shall further order that these employees be made whole for any loss of earnings, the amounts to be computed in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel, supra.*[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Van Dorn Plastic Machinery Co., Division of Van Dorn Company, Strongsville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

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12. See, generally, *Isis Plumbing, supra.*

1. Substitute the following for paragraph 2(d):

"(d) Refusing, in violation of Section 8(a)(5) and (1) of the Act, to recognize, meet, and bargain with the Union as the certified exclusive collective-bargaining representative of the above unit of employees, including refusing to meet and bargain with the Union over the decision and effects of Respondent Employer's unilateral change in its paid lunch policy for certain employees; refusing to meet and bargain with the Union over Respondent Employer's unilateral change in its attendance/tardiness program; and refusing to furnish the Union with certain data requested by the Union for purposes of collective bargaining and relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all employees of Respondent in the above appropriate unit."

2. Substitute the following for paragraph 2(a):

"(a) Recognize and, upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of the above unit of employees, including meeting and bargaining with the Union about the decision and effects of Respondent Employer's unilateral change in its paid lunch policy for certain employees and its absence/tardiness program, and, if an understanding is reached, embody such understanding in a signed agreement; and, upon request, furnish the Union with data requested for purposes of collective bargaining, relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all employees of Respondent in the above appropriate unit."

3. Add the following as paragraph 2(b), and reletter the subsequent paragraph:

"(b) Restore the status quo, and make employees whole for lost earnings and benefits as prescribed in the

section of the Board's Decision and Order entitled 'Amended Remedy' "

4. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. December 14, 1982

JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
DON A. ZIMMERMAN, Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to recognize, meet, and bargain with District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL—CIO, as the certified exclusive collective-bargaining representative of the employees in the unit described below:

> All employees and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technicians, research and development employee(s), truck drivers, and all foremen and supervisors of higher rank and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT unlawfully interrogate our employees concerning the status of their strike vote or unlawfully urge our employees not to support a strike.

WE WILL NOT tell our employees that we will never recognize the Union and that it would be useless for employees to go out on strike, or tell our employees that we will not bargain with the Union until the Federal courts have determined whether the election was a fair one.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL recognize and, upon request, meet, and bargain with the Union as the certified exclusive collective-bargaining representative of the above unit of employees, including meeting and bargaining with the Union about the decision and effects of our prior unilateral change in paid lunch policy for certain employees, and the change in our absentee/tardiness program and, if an understanding is reached, embody such understanding in a signed agreement; and WE WILL, upon request, furnish the Union with data requested for purposes of collective bargaining, relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all our employees in the above appropriate unit.

WE WILL restore the status quo by revoking the unilateral change in the paid lunch policy and absentee/tardiness program, and WE WILL make whole employees who were denied pay, discharged, suspended, or otherwise denied work opportunities solely as a result of the unilateral changes set forth above, with interest, and WE WILL rescind and expunge all records of disciplinary actions resulting from the unilateral change in the absence/tardiness program, and WE WILL offer employees discharged, sus-

pended, or otherwise denied work opportunities solely as a result of the unilateral change in the absence/tardiness program immediate and full reinstatement to their former positions or, if those jobs are not available, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges.

VAN DORN PLASTIC MACHINERY CO.,
DIVISION OF VAN DORN COMPANY

.....

(Employer)

Dated ..... By .....

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, 1240 East 9th Street, Room 1695, Cleveland, Ohio 44199, Telephone 216-522-3733.

ORDER OF THE NATIONAL LABOR RELATIONS BOARD REMANDING PROCEEDING TO THE ADMINISTRATIVE LAW JUDGE

(Dated November 12, 1980)

253 NLRB No. 29

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VAN DORN PLASTIC MACHINERY CO., DIVISION OF VAN DORN COMPANY	Cases 8-CA-11669
and	8-CA-11842
DISTRICT LODGE 54 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL—CIO	8-CA-12243
and	Case 8-CA-12205
THOMAS W. VALE, an Individual	

ORDER REMANDING PROCEEDING TO THE ADMINISTRATIVE LAW JUDGE

On March 31, 1980, Administrative Law Judge Robert G. Romano issued his Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs, and Respondent filed a brief in opposition to the General Counsel's exceptions. For the reasons explained below, the Board has decided to remand this proceeding to the Administra-

tive Law Judge for a further hearing and for a supplemental decision.

The amended consolidated complaint in this proceeding alleged, *inter alia,* that since February 22, 1978, Respondent had refused to meet and bargain with the Union as the certified bargaining representative of certain of Respondent's employees in an appropriate unit and that this refusal to meet and bargain violated Section 8(a)(5) and (1) of the Act. However, since he found that the Union was not entitled to certification based upon the related representation proceeding,[1] the Administrative Law Judge concluded that Respondent's refusal to bargain was not a violation of Section 8(a)(5) and (1) of the Act.

In reaching this conclusion, the Administrative Law Judge noted the following facts from the representation proceeding in Case 8-RC-10830. In its Objection 8, Respondent alleged that, on the day of the election, which the Union won, the Union had distributed a flyer

> . . . containing what purported to be a copy of one of the Union's contracts, containing provisions for wage rates for various job classifications, pension and premium pay. . . . In fact, such "contract" was a forgery in that there are no fixed wage rates contained in the actual contract, and there are no provisions for set-up, leadman, or instructional premiums.

The Regional Director applied the then-prevailing law of *Shopping Kart Food Market, Inc.*,[2] and found that, because the flyer did not involve a forgery or an improper involvement of the Board and its processes, it was not objectionable. On January 17, 1978, following exceptions by Re-

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1. Case 8-RC-10830.
2. 288 NLRB 1311 (1977).

spondent, the Board (by a panel of Chairman Fanning, Member Jenkins, and then Member Walther) adopted the Regional Director's recommendations, which resulted in a certification being issued to the Union.[3]

Thereafter, Respondent refused to bargain with the Union as the certified bargaining representative of certain of its employees. This refusal along with other of Respondent's actions was alleged to be an unfair labor practice in the amended consolidated complaint in this proceeding. A hearing on this complaint was held on dates in October and December 1978. At the hearing in the instant proceeding, Respondent attempted to relitigate the issue of the leaflet, but, upon objection, the Administrative Law Judge ruled that Respondent was precluded from raising in this unfair labor practice proceeding issues which were raised and disposed of in the representation proceeding in Case 8-RC-10830. Accordingly, no additional evidence involving the leaflet was introduced.

Thereafter, on the last day of the hearing and without the parties' knowledge, the Board issued its Decision in *General Knit of California, Inc.*,[4] overruling *Shopping Kart*, and returning to the standard of review for alleged misrepresentations set out in *Hollywood Ceramics Company*,

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3. With regard to the campaign flyer, Chairman Fanning and Member Jenkins stated at fn. 2 of the January 17 Decision:

> Chairman Fanning and Member Jenkins agree with the Regional Director that when viewed in light of the Board's recent decision in *Shopping Kart Market, Inc.*, 228 NLRB No. 190 (1977) the alleged misrepresentations do not warrant setting aside the election. Although Chairman Fanning and Member Jenkins dissented in *Shopping Kart, supra*, and continue to subscribe to the views stated in their dissenting opinion, they nevertheless recognize that the majority opinion in that case represents current Board policy and will, therefore, apply that policy in this proceeding.

4. 239 NLRB 619 (1978) (Members Penello and Murphy dissenting separately).

Inc.[5] That standard indicated, *inter alia,* that a misrepresentation which may reasonably be expected to have a significant impact on the election will cause it to be set aside. The Administrative Law Judge analyzed what effect the Board's reversal of *Shopping Kart, supra,* in *General Knit, supra,* had on the unfair labor practices alleged in this proceeding. He determined, and we agree, that *General Knit* is controlling.

The Administrative Law Judge then analyzed Objection 8 under the criteria of *General Knit, supra,* but he did so based only on the formal papers submitted in the representation proceeding. As set out in his Decision, these papers include the formal objection itself, with exhibits attached; the Regional Director's comments in his report on the objection; Respondent's exceptions to the Regional Director's report; and the Board's Decision adopting the report.[6] From this material, the Administrative Law Judge concluded that there were material misrepresentations in the flyer, involving wage rates, which warranted the setting aside of the election under *General Knit.* He accordingly dismissed the allegations of the complaint alleging an 8(a)(5) violation.

Both the General Counsel and the Charging Party have excepted to this portion of the Administrative Law Judge's Decision and they urge that the issue be remanded for a full hearing.[7] They argue that the Administrative Law Judge was in error in relying solely on the papers in the representation proceeding in analyzing the objection. They note that, notwithstanding the Regional Director's com-

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5. 140 NLRB 221 (1962).

6. There was no hearing on any of the objections in the representation proceeding.

7. As an alternative argument, the Union claims no hearing is necessary to find in its favor.

ments on the alleged misrepresentations in the flyer, he resolved the case based on the application of *Shopping Kart.*

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board, having duly considered the matter, is of the opinion that there exist material issues of fact and law concerning Objection 8 which warrant a remand of this proceeding to the Administrative Law Judge for the purposes of conducting a further hearing on that objection under *General Knit, supra.* The Board is not satisfied that the representation proceeding in Case 8-RC-10830, which was conducted entirely under the standard set out in the now-overruled *Shopping Kart* Decision, was sufficient to resolve the objection.[8]

Accordingly, it is hereby ordered that this proceeding be remanded to Administrative Law Judge Robert G. Romano for the purpose of conducting a further hearing with regard to Respondent's Objection 8 in Case 8-RC-10830 in light of the Board's Decision in *General Knit of California, Inc.,* 239 NLRB 619. At the hearing, all parties shall be allowed to adduce whatever evidence they deem pertinent on that objection.

IT IS FURTHER ORDERED that, upon the conclusion of the hearing, the Administrative Law Judge shall prepare and serve on the parties a Supplemental Decision

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8. In this regard, the Board does not find it significant that the Union did not except to certain of the Regional Director's comments. As the then-prevailing law of *Shopping Kart* did not call for such comments, the Regional Director's observations there were in the nature of *dicta.* And, given the law under *Shopping Kart,* the Board finds the Union was not duty bound to respond to these comments which were not an essential element of the Regional Director's report.

containing findings of fact, conclusions of law, and recommendations based on the evidence received at the reopened hearing and that, following service of such Supplemental Decision on the parties, the provisions of Section 102.46 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, shall be applicable.[9]

Dated, Washington, D.C. November 12, 1980

JOHN H. FANNING, Chairman
HOWARD JENKINS, JR., Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

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9. The Board is aware that, in addition to the general refusal to meet and bargain allegation of the complaint, Respondent is alleged to have violated Sec. 8(a)(5) and (1) of the Act in various other respects. The Board is also aware that the Administrative Law Judge recommended dismissal of these allegations based on his finding no general duty to bargain on Respondent's part. However, the Board is further cognizant that the Administrative Law Judge made certain alternative findings on these 8(a)(5) allegations; i.e., assuming a valid certification of the Union, the Administrative Law Judge then passed on each 8(a)(5) violation alleged. He found certain violations and dismissed others. The parties have excepted to those findings which are adverse to them as to certain findings on 8(a)(1) allegations. The Board reserves ruling on all these additional allegations, many of which may be dependent on the validity or lack thereof of the certification in Case 8-RC-10830. When the Administrative Law Judge has ruled in his Supplemental Decision on the issue remanded, his recommended Order will reflect that Supplemental Decision and the Board will then pass on any exceptions raised to that Supplemental Decision.

MEMBER PENELLO, dissenting:

Once again, the *General Knit*[10] majority upsets a certification validly issued under *Shopping Kart*. Once again, the employees' desires as expressed at the ballot box are frustrated. Once again, I must dissent.

The facts tell the all too familiar story of delay, delay, delay. On April 22, 1977, the employees voted for union representation in a secret-ballot election. From that time to the present day, the parties have been locked in litigation over the status of the bargaining agent and related issues, and the employees have been deprived of the services of their duly elected representative. My colleagues' decision serves only to exacerbate the problem by remanding this seemingly endless proceeding for yet further litigation concerning Respondent's misrepresentation objection that was properly overruled under *Shopping Kart* when the Board certified the Union almost 3 years ago. I find this result intolerable.

Even should the Union eventually prevail, the eroding effects of time and employee turnover would render the certification virtually worthless in terms of effective collective bargaining.

I would direct Respondent to the bargaining table now.

Dated, Washington, D.C. November 12, 1980

JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS BOARD

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10. *General Knit of California, Inc.*, 239 NLRB 619 (1978). As I stated in my *General Knit* dissent, I adhere to the sound principles of *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977).

NATIONAL LABOR RELATIONS BOARD'S DECISION AND CERTIFICATION OF REPRESENTATIVE

(Dated January 17, 1978)

Case 8-RC-10830

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VAN DORN PLASTIC MACHINERY CO.,
DIVISION OF VAN DORN COMPANY
Employer

and

DISTRICT LODGE 54 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held April 22, 1977[1] and the Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby

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1. The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 151 for, and 131 against, the Petitioner; there were no challenged ballots.

adopts the Regional Director's findings and recommendations.[2]

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employee(s), truckdrivers, and all foremen and supervisors of higher rank and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

Dated, Washington, D. C., January 17, 1978.

JOHN H. FANNING, Chairman
HOWARD JENKINS, JR. Member
BETTY SOUTHARD MURPHY, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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2. Chairman Fanning and Member Jenkins agree with the Regional Director that when viewed in light of the Board's recent decision in *Shopping Kart Food Market, Inc.*, 228 NLRB No. 190 (1977) the alleged misrepresentations do not warrant setting aside the election. Although Chairman Fanning and Member Jenkins dissented in *Shopping Kart, supra* and continue to subscribe to the views stated in their dissenting opinion, they nevertheless recognize that the majority opinion in that case represents current Board policy and will, therefore, apply that policy in this proceeding.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT VACATING JUDGMENT OF JUNE 6, 1984

(Filed July 23, 1984)

Nos. 83-5012
83-5118

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

vs

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

BEFORE: LIVELY, *Chief Judge,* JONES and CONTIE, *Circuit Judges.*

Pursuant to Rule 19 of the Federal Rules of Appellate Procedure, respondent has moved this Court to vacate the judgment entered by the Court upon the opinion of the Court filed herein on June 6, 1984. No objections having been filed,

It is ORDERED that the judgment entered on June 6, 1984, be and it hereby is vacated.

It is further ORDERED that a judgment in the form attached herewith be entered this date.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 23, 1984)

Nos. 83-5012
83-5118

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

vs

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

BEFORE: LIVELY, *Chief Judge,* JONES and CONTIE, *Circuit Judges*

This cause came on to be heard upon a petition filed by Van Dorn Plastic Machinery Company, to review an order of the National Labor Relations Board, issued against said Petitioner, its officers, agents, successors and assigns, on December 14, 1982, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on February 21, 1984, and has considered the briefs and transcript of record filed in this cause. On June 8, 1984, the Court, being fully advised of the premises, handed down its opinion enforcing in part, denying in part, vacating in part and remanding in part the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that enforcement of the Board's order is denied insofar as it finds a violation of the Act consisting of a unilateral implementation of an attendance control policy;

FURTHER ORDERED AND ADJUDGED by the Court that the Board's order is vacated insofar as it finds a violation of the Act in Petitioner's change in its paid lunch period policy and that this portion of the case is remanded to the Board for further proceedings; and

FURTHER ORDERED AND ADJUDGED by the Court that the Petitioner, Van Dorn Plastic Machinery Company, Division of Van Dorn Company, Strongsville, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning the status of a strike vote and urging employees not to support a strike.

(b) Telling Petitioner's employees that Petitioner will never recognize District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter called the Union), and that it would be useless for employees to go out on strike.

(c) Telling Petitioner's employees that Petitioner will not bargain with the Union until the federal courts have determined whether the election was a fair one.

(d) Refusing, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (hereinafter called the Act), to recognize, meet, and bargain with the Union as the certified exclusive collective-bargaining representative of Petitioner's employees in the appropriate

bargaining unit,[1] including refusing to meet and bargain with the Union over the effects of Petitioner's change in its paid lunch policy for certain employees and refusing to furnish the Union with certain data requested by the Union for purposes of collective bargaining and relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all employees of Petitioner in the above appropriate unit.

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of the above unit of employees, including meeting and bargaining with the Union about the effects of Petitioner's change in its paid lunch policy for certain employees, and, if an understanding is reached, embody such understanding in a signed agreement; and, upon request, furnish the Union with data requested for purposes of collective bargaining, relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all employees of Petitioner in the above appropriate unit.

(b) Post at its plant in Strongsville, Ohio, copies of the attached notice marked "Appendix." Copies of the notice on forms provided by the Regional Director for

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1. The appropriate bargaining unit is:

All production and maintenance employees, including leadmen working at the employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employee(s), truckdrivers, and all foremen and supervisors of higher rank, and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

Region 8 of the National Labor Relations Board (Cleveland, Ohio), after being duly signed by Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt thereof, and be maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within twenty (20) days from the date of this Judgment, what steps the Petitioner has taken to comply herewith.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN,
Clerk

APPENDIX

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WE WILL NOT refuse to recognize, meet, and bargain with District Lodge 54 of the International Association of Machinists and Aerospace Workers, AFL-CIO, as the certified exclusive collective-bargaining representative of the employees in the unit described below:

> All production and maintenance employees, including leadmen working at the Employer's facility located at 11792 Alameda Drive, Strongsville, Ohio, but excluding dispatchers, quality control technicians, final quality control employees, manufacturing methods technician, research and development employee(s), truckdrivers, and all foremen and supervisors of higher rank, and all office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT unlawfully interrogate our employees concerning the status of their strike vote or unlawfully urge our employees not to support a strike.

WE WILL NOT tell our employees that we will never recognize the Union and that it would be useless for employees to go out on strike; or tell our employees that we will not bargain with the Union until the federal courts have determined whether the election was a fair one.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL recognize and, upon request, meet and bargain with the Union as the certified exclusive collective-bargaining representative of the above unit of employees, including meeting and bargaining with the Union about the effects of our prior change in paid lunch policy for certain employees, and, if an understanding is reached, embody such understanding in a signed agreement; and WE WILL, upon request, furnish the Union with data requested for purposes of collective bargaining, relating to wages, fringe benefits, job classifications, hiring dates, and home addresses of all our employees in the above appropriate unit.

VAN DORN PLASTIC MACHINERY CO.,
DIVISION OF VAN DORN COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, 1240 East 9th Street, Room 1695, Cleveland, Ohio 44199, Telephone 216-522-3733.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed July 17, 1984)

No. 83-5012
No. 83-5118

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VAN DORN PLASTIC MACHINERY COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

BEFORE: LIVELY, *Chief Judge;* JONES and CONTIE, *Circuit Judges.*

No judge in regular active service on the court having requested en banc consideration of the petition for rehearing filed herein, the petition has been referred to the hearing panel. Upon consideration the court concludes that the issues raised in the petition for rehearing were fully considered upon the original submission and decision of this appeal and that rehearing is not required.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

LETTER SENT TO VAN DORN EMPLOYEES FROM INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS WITH ATTACHMENTS

JAMES N. IAFELICE, President
Affiliated with AFL-CIO
Phone: (216) 241-0290

EDWYNE Moss, Sec'y-Treas.
2906 Euclid Avenue
Cleveland, Ohio 44115

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS
DISTRICT 54

ATTENTION: VAN DORN EMPLOYEES

You recently received a pamphlet entitled Van Dorn verses the Machinists. This pamphlet like all other material given out through the years by Van Dorn was distorted and twisted the truth. But that's understandable when you consider the fact that Van Dorn didn't have an awful lot to do with writing it. Instead it was written by a professional whose very expensive livelyhood [sic] depends on his ability to keep the working people of this contry [sic] confused and divided.

Most professionals such as the author of Van Dorn VS the I.A.M. belong to the Bar. Most companies such as Van Dorn belong to the Associated Industries or National Association of Manufacturer [sic]. They are members in good standing and probably pay all fees and live up to all obligations placed on them by their (Union) oops organizations. If they need the protection of an organization with all their power and wealth, Why shouldn't you have your organization to protect your interest?

A. Consider these facts not once does the word agreement appear in Van Dorns [sic] Policy Manual.

B. The plant that was suppose [sic] to have I.A.M. negotiated rates show no location or identification of area rates.

C. Van Dorn wage and benefits were duplications of the one given out in 1974 with no improvements.

D. Van Dorn profits have increased immensely since 1974.

As a result of many mistatements and omissions we have decided to fill in the spaces left vacant by the company. I have attached some rates and language from one *of our* I.A.M. & A.W. contracts these rates are in effect until April 30th, when a new *contract* will be negotiated. Omitted from Van Dorn VS I.A.M. was some policy statement from Van Dorn employees *Manual.* I have filled in those blank spaces also.

CLARENCE DAVIS
Organizer
District #54, IAM & AW

ED MOSS
Secretary-Treasurer
District #54, IAM & AW

Between NELSON STUD WELDING COMPANY party of the first part, and hereinafter referred to as "The Employer", and the INTERNATIONAL ---- ---TION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE NO. --- --- its affiliated Local Lodges signatory to this Agreement, party of th- ----- -art hereinafter referred to as "The Union."

[Commencing as of May 1, 1976 the Employer shall pay into the Pension Trust Fund an additional hourly contribution of ten cents (10¢) per hour worked for a contribution rate of sixty cents (60¢) per hour.]

1.	Tool and Die Make--	$10.78
2.	Tool and Die Machin----	$ 9.78
3.	Senior Electronics Te--	$ 9.88
4.	Electronic Tech.	$ 9.47
5.	Maintenance Machinist	$ 9.76
6.	Maintenance Welder	$ 9.76
7.	Journeyman Machinist	$ 9.03
8.	Journeyman Welder	$ 9.03
9.	Automatic Screw Machinist	$ 9.13
10.	Journeyman Painter	$ 9.04
11.	Die Setter and Adjuster	$ 8.27
12.	Specialist	$ 7.71
13.	Tool Crib Attendant	$ 7.71
14.	Shop Janitor	$ 6.91

Section 8. Pay for Set-up Men, Leadmen, Instructors

(a) When an employee is specifically assigned to set up machi--- --- other employees, he shall receive not less than ten percent (10%) above the h----st rate of pay for the classification set up. Set-up men are defined as employees, other than Die Setters and Machine Adjusters, who are assigned to set up work for others. A Set-up Man may periodically check the proper functioning of the operation he sets up. In exception to the above, employees who set up for Specialists shall receive not less than the Journeyman Machinist rate of pay.

(b) When an employee is specifically assigned to instruct other employees, he shall receive not less than ten percent (10%) above the rate of pay for the highest classification instructed.

(c) When an employee is specifically assigned as Leadman, he shall receive not less than ten percent (10%) above the rate of pay for the highest classification led, or five percent (5%) above his own classification rate, whichever is greater. A Leadman may have the responsibility for direction of personnel, including instruction and assignment of work, and for the set-up, adjustment and proper functioning of equipment.

Section 3. Study of Job Evaluation For Manufacturing Concerns:

It is agreed that the parties herein will meet at the request of either party to discuss a job evaluation system to meet the requirements of the manufacturing operations of the Employer. It is further agreed that no job evaluation program shall be installed except by express agreement in writing between the Employer and the Union.

THESE ARE THE EXCERPTS FROM THE VAN DORN EMPLOYEE'S MANUAL - NOT FOUND IN OUR CONTRACTS. THIS IS CALLED NON-UNION SECURITY.

	First Offense	Second Offense	Third Offense	Fourth Offense
1. Reckless driving on Company property.	Written Warning	One Day Suspension	Three Day Suspension	Discharge
2. Threatening, intimidating, coercing, or interfering with fellow employees on Company premises.	Written Warning	Three Day Suspension	Discharge	
3. Gambling or engaging in lottery on Company time.	Five Day Suspension	Discharge		
4. Falsifying personnel records.	Discharge			
5. Knowingly punching the time card of another employee, having one's time card punched by another employee, or unauthorized altering of a time card.	Discharge			
6. Absent and unreported for three consecutive working days.	Discharge			
7. Leaving plant during working hours without authorization.	Discharge			
8. Reporting for work while under the influence of alcohol or drugs.	Discharge			
9. Drinking alcoholic beverages on Company premises.	Discharge			

10.	Operating, using, or possessing Company machines, tools, or equipment to which employee has not been assigned to work or authorized to use.	First Offense [sic]
11.	Flagrant violation of Company safety rules.	Discharge
12.	Sleeping on job during working hours.	Discharge
13.	Distributing written or printed matter of any description or the taking of any types of surveys in work areas during work times without management approval.	Discharge
14.	Immoral behavior.	Discharge
15.	Provoking or instigating a fight during working hours or on Company premises.	Discharge
16.	Willful attempt to injure others or possession of dangerous weapons or explosives on Company property.	Discharge
17.	Insubordination.	Discharge
18.	Destroying or defacing Company or employee property.	Discharge
19	Theft or unauthorized removal from the premises of any Company or employee property.	Discharge

	First Offense	Second Offense	Third Offense	Fourth Offense	Fifth Offense	Sixth Offense
1. Parking vehicles in an unauthorized area.	Verbal Warning	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge
2. Creating or contributing to unsanitary conditions or poor housekeeping.	Verbal Warning	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge
3. Failure to ring in or out when entering or leaving the Company premises at any time.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
4. Soliciting or collecting contributions for any purpose whatsoever unless authorized by management.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
5. Posting or removing notices, signs, or writing in any form on bulletin boards or Company property at any time without specific authority of management.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
6. Excessive garnishments.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
7. Abuse of consumption of refreshments which causes interference with production.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
8. Smoking on job which interferes with production or in areas prohibited.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
9. Violation of safety rules or safety practices.	Verbal Warning	Written Warning	One Day Suspension	Three Day Suspension	Discharge	
10. Failure to follow instructions.	Verbal Warning	Verbal Warning	Written Warning	Three Day Suspension	Discharge	

	First Offense	Second Offense	Third Offense	Fourth Offense
Falsifying Company records unless management determines there were extenuating circumstances.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Habitual tardiness or absenteeism without reasonable cause.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Refusal to work assigned overtime without reasonable cause.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Entering restricted areas without specific permission.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Engaging in horseplay, scuffling, or throwing things.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Wasting time, inattention to work, loitering, or leaving place of work or department during working hours.	Verbal Warning	Written Warning	Three Day Suspension	Discharge
Poor performance or productivity.	Verbal Warning	Written Warning	Three Day Suspension	Discharge

VAN DORN COMPANY

2700 East 79th Street
Cleveland, Ohio 44104
Phone 216 361-5234

LAWRENCE C. JONES
Chairman and President

March 24, 1977

To Investors:

As recently announced, the quarterly cash dividend has been increased from 11 cents per share to 12½ cents per share, effective with payment to be made May 13, 1977, to shareholders of record on April 15. This action raises the annual dividend to 50 cents per share and represents the third increase in the quarterly cash dividend over the past 11 months, the result of improved earnings and an encouraging outlook for the future.

The audit has been completed and sales and earnings for the year 1976 compared to 1975 figures were:

	For Three Months Ended December 31		For 12 Months Ended December 31	
	1976	1975	1976	1975
Sales	$35,787,000	$28,379,000	$135,817,000	$99,952,000
Income Before Taxes	1,514,738	2,264,608	8,744,653	5,409,372
Taxes	637,700	1,107,000	4,248,000	2,602,000
Net Income	877,738	1,157,608	4,496,653	2,807,372
Net Income Per Share	.29	.39	1.50	.94

While both sales and earnings established new dollar highs, it is necessary to consider the effects of inflation when comparisons are made to previous record years. Earnings for the past year amounted to 3.3 cents on each dollar of sales, which are considerably below our potential. It is obvious that there is room for improvement, which I believe can be achieved this year.

In comparing the above quarterly earnings, two points should be noted: first, the 1975 fourth quarter was, and is, the best fourth quarter in the history of the company, and, second, in 1976 we experienced a greater than normal fourth quarter decline in the earnings of certain *container operations* as a result of cost increases not covered by price increases.

The last dividend enclosure reported problems caused by severe weather and the natural gas shortage. We did experience some shutdowns during January and February. While this problem had an adverse effect on some operations, I am pleased to report that shipments overall for the first two months of 1977 are 25% ahead of those for the same period of 1976, the result of increased shipments of *plastic molding machines*.

The annual report will be mailed to you about April 15 and the annual meeting will be held on Saturday, May 7, at the Sheraton Inn, 26300 Chagrin Boulevard, Beachwood, Ohio 44122, at 10 a.m. As they say in Georgia, "Y'all come."

Sincerely,

/s/ L. C. JONES
L. C. Jones
Chairman

LCJ/m

LETTER TO EMPLOYEES FROM SAMUEL H. SMITH, JR.

May 4, 1978

Dear Fellow Employees:

In our previous communications, we have endeavored to truthfully communicate the facts surrounding union activities. On the other hand, the I.A.M. has chosen to use a less than truthful approach. For example, in their letter to members of April 28, there are several misstatements. We thought you ought to know the true facts.

> First, the Company did not state that it had no intention of negotiating a contract. What the Company did say was that it would not bargain with the Union until the Federal Courts have determined whether the election was a fair one.
>
> Second, appeals *have* not been exhausted. The National Labor Relations Act provides as follows:
>
> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any *circuit court of appeals* of the United States. . ."
>
> The appeals process has already been set into motion by the fact that the I.A.M. filed an unfair labor charge on April 10.

In view of this information, the question must be asked: Why is the Union again asking for a strike vote? On April 2 in a vote conducted by the I.A.M., the employees of Van Dorn voted not to strike. We believe that serious questions must be raised as to the I.A.M.'s motivation to call for another strike vote when a peaceful alternative

has already been selected by our employees. Why does the Union want you to lose your wages and benefits when you don't have to go on strike to have the Courts decide whether the election was fair or not?

In addition to the Union's letter of April 28, many of you also received a copy of the Union demands to the Company. It is important to understand that these demands *don't* have any relevance to a strike vote. *Even if* the Company recognized the I.A.M. as your bargaining agent, there could be *no guarantee* that *any* of these demands would be met.

The I.A.M. has made a selective mailing announcing their meeting. We encourage you to consider these facts and strongly urge *all* of you to attend the Union meeting on May 7 to exercise your right to vote. Don't let a small minority determine the fate of the majority.

If you have any questions regarding this matter, please ask your Supervisor.

Sincerely yours,

/s/ SAM SMITH
Samuel H. Smith, Jr.

SHS/lm

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS

(October 25, 1978)

* * * * *

[76] RECROSS-EXAMINATION

Q. (By Mr. Ashmus) Let me ask if during either conversation you had with Mr. Sheffield you felt intimidated in any way?

A. By Mr. Sheffield?

Q. Yes, sir.

A. He just asked me a question and I just answered it.

Q. But you didn't feel afraid, did you?

A. Afraid?

Q. Yes.

A. No, sir.

Mr. Ashmus: No other questions.

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